

**IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA
(Exercising its Admiralty Jurisdiction)**

Case No: **AC210/2009**

Name of Ship: **MV "CHENEBOURG"**

In the matter between:

LAURITZEN BULKERS A/S

PLAINTIFF

and

THE MV "CHENEBOURG"

DEFENDANT

and

SWISS MARINE CORPORATION LTD

INTERVENING PARTY

AND

CASE NO: **A224/2009**

Name of Ship: **MV "CAPE GULF"**

In the matter between:

MAPLE MARITIME INC

APPLICANT

and

E.A.S.T. INTERNATIONAL LTD (in liquidation)

1ST RESPONDENT

and

**EMIRATES TRADING AGENCY LLC
MV "CAPE GULF"
UNITED CAPE A/S**

**2ND RESPONDENT
3RD RESPONDENT
INTERVENING PARTY**

REASONS

KRUGER J:

[1] On the 2nd November 2009, I granted the following order in respect of the MV "Chenebourg":

- "1. The Plaintiff is directed, by not later than 14hoo on Tuesday 3rd November 2009, to provide security to the Intervening Party in the form of a bank guarantee issued by a first class South African Bank or other security to the satisfaction of the Intervening Party for losses suffered as a result of the delay in the departure of the MV "Chenebourg" as a consequence of the arrest, in the amount of US\$2 625 122,00; daily demurrage in an amount of US\$38 600,00 for the period 6th October 2009 to date and in the sum of R250 000,00 in respect of the Intervening Party's legal costs.
2. In terms of Section 5(2)(c) of Act 105 of 1983, the arrest is made subject to the provision of security in accordance with paragraph 1 above and, if security is not so provided, the said arrest shall lapse and cease to be of any force or effect."

[2] On the following day, I was informed that the Plaintiff had failed to provide security. An order releasing the vessel from arrest was duly granted.

[3] On the same day, I granted an order in respect of the MV "Cape Gulf" in the following terms:

- '1. Leave is granted to the United Cape A/S to intervene.
2. The order granted on the 27th October 2009 in terms of Rule 6(12)(c) is reconsidered and the arrest of the MV "Cape Gulf" be and is hereby set aside.

3. The Applicant (Maple Maritime Inc.) is directed to pay the costs of the Intervening Party.
4. The Registrar is authorised and directed to issue a release warrant.
5. the Sheriff is authorised to serve the release warrant on the Port Captain, Richards Bay by telefax.
6. Service of the release warrant on the Applicant, the Respondents and the Intervening Party is dispensed with."

[4] My reasons for granting the aforesaid orders are set out hereinafter.

[5] At the time of the arrest, the MV "Chenebourg" was on a time charter to Swiss Marine Corporation Limited. Much of the argument revolved around the identity of the owner of the vessel or the identity of the Demise Charterer. I do not intend making a finding on the factual issue of whether Sunwoo Merchant Marine (Sunwoo MM) was the owner or "manager" or "group owner" of the vessel as the argument centred around the arrest in terms of Section 1(3) of the Admiralty Jurisdiction regulation Act No. 105 of 1983. For purposes of this judgment therefore it is assumed, in favour of the Plaintiff, that Sunwoo MM was the Demise Charterer of the vessel at the time of the arrest.

[6] It is common cause that the ship in respect of which the Plaintiff's claim arose is the MV "Sunny Glory". The Plaintiff's

claim arose in respect of a charter of the "Sunny Glory" by the Plaintiff to Sunwoo MM. In terms of Section 3(7)(c) of the Act Sunwoo MM was deemed to have been the owner of the "Sunny Glory" at the time when the maritime claim arose.

[7] In order to arrest the Defendant as an associated ship of the "Sunny Glory", the Plaintiff asserted, *inter alia*, that the Defendant was on demise charter, at the time when the action was commenced, to Sunwoo MM. The Plaintiff was accordingly entitled (so it alleged), in terms of the provisions of Section 1(3) of the Act, to arrest the Defendant.

[8] At the time of arrest of the "Cape Gulf", the vessel was on demise charter to Cape Gulf Inc. The Plaintiff asserted that the "Cape Gulf" is an associated ship of the MV "Amfialos" and was subject to arrest in terms of Section (1)(3) of the Act.

[9] Section (1)(3) of the Admiralty Jurisdiction Regulation Act No. 105 of 1983 (the Act) provides:

"For the purposes of an action *in rem*, a charterer by demise shall be deemed to be, or to have been, the owner of the ship for the period of the charter by demise."

[10] Counsel for the Plaintiff submitted that the literal, ordinary, grammatical meaning of the section admits of no other interpretation other than that wherever the word “owner” appears in connection with an action *in rem*, a bare-boat charterer will be deemed to be the owner, or to have been the owner, of the ship for the period of the charter by demise. Relying on the judgment of **Public Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd and Others 1990(1) SA 925 (A)** (quoted in **Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School 2008(5) SA1 (SCA) at paragraph 19**), counsel has argued that the primary rule of construction of statutes is to ascertain the intention of the Legislature, which, in the first instance, is achieved by giving words of the statute their ordinary grammatical meaning, unless to do so would lead to an absurdity so glaring that the Legislature could not have contemplated it. Applying this rule of interpretation to Section 1(3) there is no ambiguity and the intention of the Legislature is evident, namely, that the said section was intended to apply to all arrests *in rem*.

[11] The so-called “Golden Rule of Interpretation” has been consistently applied by our Courts. However, as pointed out by van Heerden JA in **Bastian Financial Services** (*supra*),

this is not the only rule of interpretation employed by our Courts. In **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004(4) SA 490(CC)**, Ngcobo J (as he then was) held (at paragraph 90):

“The emerging trend in statutory construction is to have regard to the context in which the words occur even where the words to be construed are clear and unambiguous”.

[12] In support thereof he referred to the judgment in **Thoroughbred Breeders Association v Price Waterhouse 2001(4) SA 551 (SAC)**, where it was held that:

“The days are long past when blinkered peering at an isolated provision in a statute was thought to be the only legitimate technique in interpreting it if it seemed on the face of it to have a readily discernable meaning. As was said in **University of Cape Town v Cape Bar Council and Another 1986(4) SA 903 (A) at 914 D-E**;

“I am of the opinion that the words of Section 3(2)(d) of the Act, clear and unambiguous as they may appear to be on the face thereof, should be read in the light of the subject-matter with which they are concerned, and that it is only when that is done that one can arrive at the true intention of the Legislature.””

[13] At paragraph 91, Ngcobo J went further and held that:

“The technique of paying attention to context in statutory construction is now required by the

Constitution, in particular, Section 39(2). that provision introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the "spirit, purport and objects of the Bill of Rights".

[14] Finally it is also to be borne in mind that the aim of statutory interpretation is to give effect to the purpose of the legislation in question. This has long been recognised in our law.

[15] In considering the provisions of Section 1(3) and applying the test as submitted by Plaintiff's counsel, a Demise Charterer of the vessel is deemed to be the owner of the vessel during the period of the charter by demise and therefore the true owner cannot, on this interpretation, be regarded as the owner of the vessel. The author G Hofmeyr, in his work "Admiralty Jurisdiction Law and Practice in South Africa", comments that this literal interpretation would lead to the situation whereby

"a creditor who would otherwise have been able to institute an action *in rem* against the ship on the grounds of the owner's personal liability would not be able to do so during the existence of the charter. This approach would, moreover, have far reaching results when applied to Section 3(6) and Section 3(7) of the Act. It is at least arguable that all that was intended is that in regard to claims against the ship in respect of which the charterer was personally liable, the charterer is deemed to be the owner so that the ship, in the hands of the charterer, can be arrested in respect of such claims. It seems unlikely that it was intended to give the real owner a moratorium in respect of claims *in*

rem against the ship in regard to which the owner was personally liable.”

[16] I agree. It clearly could not have been the intention of the Legislature to expand the parameters of arrests beyond that for which the Demise Charterer is personally liable during the period of the charter.

[17] Counsel for the Intervening Party has argued that the words “the ship” as it appears in Sections 3(5); 3(6); 3(7)(a) and 3(7)(c), all refer to what is commonly referred to as “the guilty ship”. Accordingly, the words “the ship” as they appear in Section 1(3) are to be interpreted as a referral to the guilty ship. There is merit in this submission. Prior to the enactment of Section 1(3), if a debt was incurred in respect of the guilty ship by the Demise Charterer, the guilty ship could not be arrested. The only recourse which the aggrieved party had was to arrest another vessel owned by the Demise Charterer. The Legislature, in my opinion, sought to redress this situation by the enactment of Section 1(3).

[18] Counsel for the Plaintiff has further submitted that on a literal reading of Section 1(3) the vessel, which is subject to a demise charter, (and accordingly “owned” by the Demise Charterer for the duration of the charter) would be susceptible

to arrest as an associated ship in terms of the provisions of Section 3(7)(a)(i). In the recent judgment of **MV "Pacific Yuan Geng"; KP7 International SA and Others v Glory Wealth Shipping (Pte) Ltd, (Case No. AC 30/2009 (WC))**, the Court disagreed with this submission. The Court construed the provision of the Section as applying only to a case of an action *in rem* against the chartered vessel consequent upon a debt incurred by the Demise Charterer during the course of the charter. The Court also found favour with the proposition that had the Legislature intended that the presumption should apply to issues of association, it would have said so in express terms, alternatively, an amendment would have been effected to Section 3(6) and 3(7) of the Act to make it clear that the presumption was applicable in that context as well.

[19] There is a further aspect which requires consideration. If one adopts the literal meaning of Section 1(3), a situation will arise whereby the owner of a demise chartered vessel will find that its vessel is subject to arrest and possible sale in respect of debts incurred in relation to some other vessel with which the owner of the demise chartered vessel has no connection at all. This may have constitutional implications in that it may be in conflict with the constitutional bar on the arbitrary

deprivation of property. However this issue will no doubt be the subject matter of a further action in due course.

[20] I am accordingly of the view that the Plaintiff's were not entitled, in terms of the provisions of Section 1(3) to arrest the MV "Chenebourg" and MV "Cape Gulf" as associated ships. I accordingly ordered the release of the vessels on the 3rd November 2009.

DATE OF HEARING:	29 OCTOBER 2009 2 AND 3 NOVEMBER 2009
DATE OF CAV:	3 NOVEMBER 2009
DATE OF JUDGMENT:	26 NOVEMBER 2009
COUNSEL FOR PLAINTIFF:	D A Gordon SC D Donnelly
COUNSEL FOR THE DEFENDANT:	S Mullins SC
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